FIRST AMENDMENT LAW REVIEW

Volume 11 | Issue 2 Article 4

1-1-2013

Maddening Choices: The Tension between Bullying and the First Amendment in Public Schools

Francisco M. Negron Jr.

MADDENING CHOICES: THE TENSION BETWEEN BULLYING AND THE FIRST AMENDMENT IN PUBLIC SCHOOLS

*FRANCISCO M. NEGRÓN, JR.**

> *"In that direction," the Cat said, waving its right paw round, "lives a Hatter: and in that direction," waving the other paw, "lives a March Hare. Visit either you like: they're both mad."*
> *"But I don't want to go among mad people," Alice remarked.*
> *"Oh, you can't help that," said the Cat, "we're all mad here."*[1]

INTRODUCTION

Public schools today can empathize with the befuddled Alice's struggle to understand the reality described by the Cheshire Cat. Educators in today's public schools have similarly difficult choices to make when dealing with the inherent tension between addressing the problem of bullying and protecting the free speech rights of students. Like Alice, the choices for school districts can be disconcerting, if not maddening. Why? Because schools are faced with balancing two strongly competing interests: ensuring safe learning environments for all students *and* protecting student free speech. At a time when federal courts disagree on how the tensions should be resolved, and without such a resolution from the Supreme Court, school leaders are left to make on-the-ground

---

*Francisco M. Negrón, Jr., is General Counsel for the National School Boards Association. He acknowledges the generous assistance of Sonja H. Trainor, Thomas W. Burns, and Nia Davis, without whom this article would not have been possible.

1. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 109 (Richard Kelly ed., Broadview Editions, 2d ed., 2011) (1865).

choices that at best recognize only one interest, and at worst result in litigation from the offended side. Sometimes this process is more akin to juggling or choosing between two mad characters than balancing.

Following a series of tragic teen suicides, legislatures across the country understandably have sought to address the problem of bullying in schools with myriad new legislation. As of this writing, all states except Montana have anti-bullying statutes requiring action by local schools.[2] These state-level legislative efforts occur even as an activist federal Department of Education, determined to use the federal purse to drive its mandates to the local school level, demands more aggressive policing and even elimination of all incidents of bullying.[3] These well-meaning efforts, however, offer little guidance to help schools understand how the free speech rights of students may affect anti-bullying efforts. While there appear to be no definitive, comprehensive studies on this matter, anecdotal reports suggest that the combination of media attention, legislation, and an aggressive federal effort may be causing an increase in the number of lawsuits filed.[4] The matter is further complicated by the lack of a definitive decision from the United

---

2. *See* SONJA TRAINOR, NAT'L SCH. BDS. ASS'N, SCHOOL DISTRICT LIABILITY FOR PEER BULLYING AND HARASSMENT: FEDERAL INITIATIVES, PLAINTIFFS' COMPLAINTS, AND CURRENT LEGAL STANDARDS 5 (2012) (citing STATE ANTI-BULLYING STATUTES, NAT'L SCH. BDS. ASS'N (2012), *available at* http://www.nsba.org/SchoolLaw/Issues/Safety/Table.pdf).

3. Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't. of Educ. (Oct. 26, 2010), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

4. According to the Oregon newspaper, *The Register-Guard*, there is a rising trend in lawsuits against public schools seeking more anti-bullying prevention. Karen McCowan, *Bullying Suits Put Schools in a Bind: Districts Being Sued by Alleged Bullying Victims as well as Accused Bullies*, THE REGISTER-GUARD (Eugene, Or.), July 3, 2012, at A1 ("'The risk management topic of the year is the issue of harassment, bullying and communication with parents,' said Geoff Sinclair, Director of Claims for the Special Districts Association of Oregon, an organization that administers Oregon school districts' self-insurance fund for legal claims. 'Schools are often put into a very difficult situation where, if they discipline Johnny a certain way for perceived harassment, they're going to get sued. I think most districts are doing what they believe is best for kids and letting the chips fall where they may.'").

States Supreme Court that offers schools a polestar to follow as they attempt to balance their strong interest in ensuring safe learning environments with a similarly strong interest in protecting the free speech rights of students. This Article explores expansive federal agency directives and disparate findings of federal courts to highlight the need for a polestar decision from the Supreme Court on which schools can rely to manage and resolve these competing values in a way that minimizes legal risk and expense.

I. THE FEDERAL EXPANSION

On October 26, 2010, Assistant Secretary for Civil Rights at the United States Department of Education, Russlynn Ali, issued a "guidance" letter to public schools.[5] The so-called "Dear Colleague Letter" set forth an expanded federal vision for the handling of bullying issues in public schools.[6] The Letter sought to conflate federal civil rights remedies and agency enforcement standards, applying broadly the analysis of peer harassment under federal civil rights statutes to the bullying context.[7] The Letter moves beyond the peer harassment analysis articulated by the Supreme Court in *Davis v. Monroe County Board of Education*,[8] prescribing myriad preventative and remedial measures to be taken by schools in a variety of bullying contexts.[9] At their cores, the Dear Colleague Letter and the historic federal initiative on bullying[10] represent an

5. Ali, *supra* note 3.

6. *See id.*

7. *See id.*

8. 526 U.S. 629, 650 (1999) (holding that federal funding recipients may be held liable for damages "only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victim of access to the educational opportunities or benefits provided by the school").

9. *See* Ali, *supra* note 3.

10. *See* TRAINOR, *supra* note 2, at 3 ("Federal agencies, led by the Obama Administration, are taking unprecedented action on the issue of peer bullying and harassment. The White House launched a media campaign that includes the 'stopbullying.gov' web site, provided numerous anti-bullying resources, and held two White House summits on bullying. The U.S. Department of Education has aligned several of its offices to work on the

effort to attack bullying at the place where students physically gather—schools—building on President Obama's personal reflections on bullying[11] and the national media spotlight on bullying-related tragedies. It is not surprising, therefore, that the Dear Colleague Letter went beyond merely urging schools to address the problem of bullying aggressively, effectively urging a new legal standard that would ultimately penalize schools, despite the success of other measures, if they fell short of completely eliminating bullying and the "hostile environment it creates."[12]

Critics of the federal government's missive charged that the Dear Colleague Letter, albeit well intentioned, failed to take into consideration the competing constitutional interests at play. For instance, shortly after the Letter was issued, the National School Boards Association (NSBA)[13] raised concerns over the First

---

perceived problem and funded research. A Federal Interagency Workgroup on Bullying is in place, with representatives from agencies including the Department of Education, the National Institutes of Health and associated agencies, the Substance Abuse and Mental Health Services Administration, the U.S. Department of Agriculture, Centers for Disease Control and Prevention, the National Institute of Justice, and the Health Resources and Services Administration.").

11. *See* Barack Obama, *President Obama Releases Anti-bullying Message*, YOU TUBE (Oct. 22, 2010), http://www.youtube.com/watch?v=IYOeQsLszvU (stating he was "shocked and saddened" by suicides of young people "who were bullied and taunted for being gay").

12. Ali, *supra* note 3, at 3–4 (emphasis added) ("A school's responsibility is to *eliminate the hostile environment* created by the harassment, address its effects, and take steps to ensure that harassment does not recur." (emphasis added)); *id.* at 2–3 ("If an investigation reveals that discriminatory harassment has occurred, a school must take prompt and effective steps reasonably calculated to end the harassment, *eliminate any hostile environment and its effects*, and prevent the harassment from recurring." (emphasis added)).

13. Founded in 1940, the National School Boards Association (NSBA) is a not-for-profit organization whose mission is to advocate for equity and excellence in public education through school board leadership. *About the National School Board Association (NSBA)*, NSBA, http://www.nsba.org/About (last visited Jan. 24, 2013). NSBA and its member state associations of school boards represent more than 90,000 local school board members, governing 13,809 local school districts serving the nation's 50 million public school students. *Id.*

Amendment implications of the federal government's new charge.[14] Specifically, NSBA warned the U.S. Department of Education that regulating student speech, even bullying speech, presented difficulties for schools, which "have a limited ability to discipline students for [protected] speech that occurs on-campus and off-campus."[15] NSBA pointed out that even harassing speech might not be categorically denied First Amendment protection[16] unless it is materially disruptive or infringes on the rights of others,[17] is patently offensive,[18] is subject to curricular control,[19] or encourages illegal drug use.[20]

NSBA also expressed concern about the Letter's suggestion that schools could regulate "bullying and harassment that takes place over the internet or through other electronic communication [that] often occurs entirely off-campus."[21] NSBA pointed out that the Supreme Court has yet to rule on the question; neither the *Tinker v. Des Moines Independent Community School District*,[22] *Bethel School District No. 403 v. Fraser*,[23] and *Hazelwood School District v. Kuhlmeier*[24] trilogy, nor the *Morse v. Frederick*[25] decision contemplated the regulation of off-campus speech expressly.[26]

Notwithstanding the constitutional challenges of regulating off-campus speech, the actual, on-the-ground realities have school officials often decrying what many perceive as an untenable goal.

---

14. Letter from Francisco Negrón, Gen. Counsel Nat'l Sch. Bd. Ass'n, to Charlie Rose, Gen. Counsel, U.S. Dep't of Educ. (Dec. 7, 2010), *available at* http://www.nsba.org/SchoolLaw/Issues/Safety/NSBA-letter-to-Ed-12-07-10.pdf.

15. *Id.* at 6.

16. *Id.*

17. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

18. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986).

19. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988).

20. Morse v. Frederick, 551 U.S. 393, 397 (2007).

21. Negrón, *supra* note 14, at 7.

22. 393 U.S. 503 (1969).

23. 478 U.S. 675 (1986).

24. 484 U.S. 260 (1988).

25. 551 U.S. 393 (2007).

26. Negrón, *supra* note 14, at 6.

Oregon School Boards Association Attorney Morgan Smith explains:

> It [is] difficult for schools to draw a line between what is something affecting kids at school and what is off-campus conduct by individual students. Schools can only really take care of what happens inside the schoolhouse. They can't really police what happens at the mall on the weekend or in cyberspace at night.[27]

Two cases out of the Third Circuit make painfully clear the perils of school officials attempting to regulate off-campus online student speech. In those cases, the U.S. Court of Appeals for the Third Circuit, sitting en banc, invalidated two school districts' disciplinary action against students for cyber speech occurring off campus—specifically, online parody profiles of the students' principals posted to the social networking site MySpace.[28] In *Layshock v. Hermitage School District*,[29] the Third Circuit rejected the school district's attempt to identify a "nexus" to the school and the applicability of the line of decided cases cited by the school district supporting its asserted authority to reach beyond the physical boundaries of the school to regulate student speech.[30] Those decisions,[31] said the court, "stand for nothing more than the rather unremarkable proposition that schools may punish expressive conduct that occurs outside of school, as if it occurred inside the 'schoolhouse gate,' under certain very limited circumstances, none of which are present here."[32] In the court's opinion, those "limited circumstances" were

---

27. McCowan, *supra* note 4.

28. *See* Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc), *cert. denied*, ___ U.S. ___, 132 S. Ct. 1097 (2012); J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc), *cert. denied*, ___ U.S. ___, 132 S. Ct. 1097 (2012).

29. 650 F.3d 205 (3d Cir. 2011) (en banc).

30. *See id.* at 216–17.

31. Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008); Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.2d 34 (2d Cir. 2007); J.S. v. Bethlehem Area Sch. Dist., 801 A.2d 847 (Pa. 2002).

32. *Layshock*, 650 F.3d at 219.

not present in *Layshock* given the admitted lack of material disruption of the educational setting and an attenuated connection to the school.[33] Similarly, in *J.S. v. Blue Mountain School District*,[34] the Third Circuit applied *Tinker* to reject the school district's assertion that it could regulate a student's off-campus, online parody of a principal because, *inter alia*, there was "no dispute that J.S.'s speech did not cause a substantial disruption in the school."[35] Neither was it reasonably foreseeable, held the court, that the profile would create a disruption, as "[t]he profile was so outrageous that no one could have taken it seriously, and no one did,"[36] and J.S. took steps to limit access to the profile.[37]

II. BETWIXT AND BETWEEN THE MAD HATTER AND THE MARCH HARE: THE COURT DECISIONS

A. Ensuring a Safe Learning Environment

Public school leaders have long understood the importance of a safe learning environment. This imperative at times drives schools to regulate speech in ways that run head long into the First Amendment.[38] The Supreme Court's seminal decision in the

33. *Id.*
34. 650 F.3d 915 (3d Cir. 2011) (en banc).
35. *Id.* at 928.
36. *Id.* at 930.
37. *Id.*
38. In an effort to help schools navigate these competing interests while avoiding the potential legal fray, the Religious Freedom Education Project of the First Amendment Center led an effort by the American Jewish Committee, joined by the National School Boards Association and "broad coalitions of educators and religious groups," to publish instructional guidelines for schools. *See* RELIGIOUS FREEDOM EDUCATION PROJECT, HARASSMENT, BULLYING AND FREE EXPRESSION: GUIDELINES FOR FREE AND SAFE PUBLIC SCHOOLS (2012), http://www.nsba.org/SchoolLaw/Issues/Equity/Harassment-Bullying-and-Free-Expression-Guidelines-for-Free-and-Safe-Public-Schools.pdf. The publication seeks to "fill a need the judicial system has not" by distinguishing between speech as a weapon and speech as the expression of an idea. Lauren Markoe, *Guidelines Seek Line Between Free Speech, Bullying*, WASH. POST, May 22, 2012, http://www.washingtonpost.com/national/on-faith/guidelines-seek-line-

student speech arena, *Tinker*, occurred in just this context. School officials, afraid of the disruption that might be caused by middle and high school students wearing black armbands in protest of the Vietnam conflict, suspended students who refused to remove them.[39] The Court, noting that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression,"[40] laid out the test that school officials would use for decades to come.[41] To restrict otherwise protected student speech, school officials would have to have reason to anticipate that the speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," or "impinge upon the rights of other students."[42] These two prongs of the standard have become known, respectively, as *Tinker*'s substantial disruption and rights of others prongs.

Since 1969, courts across the United States have applied the *Tinker* decision, each time essentially reassessing the appropriate balancing point between school officials' safety concerns and students' free speech rights.[43] On the safety side of the equation, some courts have been sympathetic to a school's interest in regulating "derogatory and injurious remarks" that have the power to psychologically attack students in order to ensure student security.[44] For instance, in *Harper v. Poway Unified School*

---

between-free-speech-bullying/2012/05/22/gIQAropmiU_story.html. In doing so, the publication offers educators non-legal guidance on avoiding a potential constitutional crisis through teachable moments in which aggressive speech is addressed through the lens of respectful discourse in a democratic society.

39. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

40. *Id.* at 508.

41. *See id.* at 509.

42. *Id.*

43. *See, e.g.*, Cuff v. Valley Cent. Sch. Dist., 677 F.3d 109 (2d Cir. 2012); S.J.W. v. Lee's Summit Sch. Dist. R-7, 696 F.3d 771 (8th Cir. 2012); Kowalski v. Berkeley Cnty Schs., 652 F.3d 565 (4th Cir. 2011); Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874 (7th Cir. 2011); Defoe *ex rel.* Defoe v. Spiva, 625 F.3d 324 (6th Cir. 2010); J.S. v. Bethlehem Area Sch. Dist., 801 A.2d 847 (Pa. 2002).

44. *See, e.g.*, Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1183 (9th Cir. 2006), *judgment vacated*, 549 U.S. 1262 (2007).

District,[45] a student wore a t-shirt with the phrases: "I will not accept what God has condemned" and "homosexuality is shameful 'Romans 1:27.'"[46] The student wore the shirt in response to observation at school of a "Day of Silence" by which the school's Gay-Straight Alliance intended to promote tolerance. Upon wearing a similar shirt the next day, the student was placed in the school principal's office for the entire school day after refusing to remove the shirt, which school officials labeled as inflammatory and contributing to a hostile environment. After a federal district court denied the student's motion for preliminary injunction, the Ninth Circuit Court of Appeals ruled in favor of the school, relying on the rarely-cited "rights of other students" prong of the *Tinker* decision.[47] "We conclude," said the majority, the student's "wearing of his t-shirt 'colli[des] with the rights of other students' in the most fundamental way."[48] The majority found that "[b]eing secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society."[49] The court narrowed its ruling specifically to harmful remarks that target a student's protected status such as race, religion, or sexual orientation.[50]

In dissent, Judge Alex Kozinski, finding nothing plainly offensive about the language of the student's shirt, argued that the school district had failed to provide enough evidence of disruption or a reasonable forecast thereof under the *Tinker* analysis to support its actions.[51] (This is not dissimilar to the Third Circuit's approach in *Layshock* and *Blue Mountain*,[52] even though these

45. 445 F.3d 1166 (9th Cir. 2006).

46. *Id.* at 1171 (capitalization removed).

47. *Id.* at 1177.

48. *Id.* at 1178 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).

49. *Id.* at 1178.

50. *Id.* at 1183.

51. *Id.* at 1193–94 (Kozinski, J., dissenting).

52. Layschock v. Hermitage Sch. Dist., 650 F.3d 205, 217 (3d Cir. 2011) (en banc), *cert. denied*, ___ U.S. ___, 132 S. Ct. 1097 (2012) ("The District rests this argument primarily on three cases which it claims allow it to respond to a student's vulgar speech when that speech is posted on the internet . . . . However, as we will explain, each of those cases involved off campus

cases involved off-campus speech). Judge Kozinski noted that the only record evidence of disruption of educational activities was some lack of focus by some students in the classroom.[53] The majority, however, reminded the dissent of *Tinker*'s second prong.[54] It noted the tension between students' individual rights and the right to a safe educational environment, and held that the school's regulation of speech here (requiring the student to remain in the principal's office after he refused to remove the shirt) was "no more than necessary to prevent the intrusion on the rights of other students," as the student was not disciplined further.[55]

This tension between the recognized goal of creating a safe educational environment free of harassment and the, albeit limited, free speech rights of students is addressed, though not overtly, in case after case. Indeed, the tension highlights a rising rift between courts upholding school regulation of student speech premised on *Tinker*'s substantial disruption standard (very common), or the rights of others prong (less common). Like the Ninth Circuit in *Harper*, some jurists are willing to extend *Tinker*'s rights of others prong by linking it to more recent Supreme Court precedent that

---

expressive conduct that resulted in a substantial disruption of the school, and the courts allowed the schools to respond to the substantial disruption that the student's out of school conduct caused."); J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 932 (3d Cir. 2011) (en banc), *cert. denied*, ___ U.S. ___, 132 S. Ct. 1097 (2012) ("Thus, under the Supreme Court's precedent, the *Fraser* exception to *Tinker* does not apply here. In other words, *Fraser*'s lewdness standard cannot be extended to justify a school's punishment of J.S. for use of profane language outside the school, during non-school hours.").

53. *Harper*, 445 F.3d at 1193–94 (Kozinski, J., dissenting) (Teacher David "LeMaster gives no indication that the distracted students refused to get back on task once they were admonished, or that the t-shirt caused a commotion or otherwise materially interfered with class activities. As this is the only evidence that Harper's t-shirt interfered with classroom learning, I find it ludicrously weak support for banning Harper's t-shirt on the ground that it would 'materially disrupt[ ] classwork.'").

54. *Harper*, 445 F.3d at 1178–82 (majority opinion). In fact, this is one of a very few decided cases to mention, much less apply, *Tinker*'s second prong. *See* Francisco M. Negrón, Jr., *A Foot in the Door? The Unwitting Move Towards A "New" Student Welfare Standard in Student Speech After* Morse v. Frederick, 58 AM. U. L. REV. 1221, 1228–32 (2009).

55. *Harper*, 445 F3d at 1183.

appears to establish a "student welfare standard" for the regulation of student speech.[56] In *Defoe v. Spiva*,[57] the U.S. Court of Appeals for the Sixth Circuit ruled that a school district's ban on displays of the Confederate flag in a school did not violate a student's free speech rights.[58] Although the decision was unanimous, one judge wrote separately to announce reliance on *Morse v. Frederick*.[59] That judge wrote that *Morse* recognized an "'important, perhaps compelling interest' in deterring drug use in the schools, [and that] there is of course a comparably 'important, perhaps compelling' interest in reducing racial tension in the public schools."[60]

The idea that schools have a role in limiting student speech in the interest of the students' welfare appears in school district policies, particularly in the bullying arena. Some courts interpreting such policies come down clearly on the side of protecting pure religious or political speech, asserting that even if it is offensive to some, school regulation of speech in what amounts to the "culture wars" is ultimately an impermissible chilling of students' rights to express a sincerely held belief.[61] But other courts are less willing to view school regulation in this manner. In *Morrison v. Board of Education of Boyd County*,[62] for instance, the Sixth Circuit affirmed a federal district court's grant of summary judgment in favor of a school district whose policy barred "stigmatizing or insulting comments regarding another student's sexual orientation."[63] In that case, a student sought a preliminary injunction against the school district, asserting that although the student never violated the policy and was never disciplined under it,

---

56. For a comprehensive treatment of the rising "student welfare standard," see generally Negrón, *supra* note 54.

57. 625 F.3d 324 (6th Cir. 2010).

58. *Id.* at 337.

59. *Id.* at 339 (Rogers, J., concurring) (relying on Morse v. Frederick, 551 U.S. 393 (2007)).

60. *Id.* at 340 (Roger, J. concurring).

61. *See* Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874 (7th Cir. 2011); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200 (3d Cir. 2001). *See also* McGlone v. Bell, 681 F.3d 718 (6th Cir. 2012) (holding that chilled speech is a constitutional free speech violation).

62. 521 F.3d 602 (6th Cir. 2008).

63. *Id.* at 605.

the policy violated his First Amendment rights.[64] He claimed that his sincerely held belief that homosexuality is a sin compelled him as a Christian to share that belief and tell people when they are sinning.[65] The student also challenged the school district's practice implementing the policy in which school officials allegedly explained in training sessions that having a sincerely held belief does not grant the right to express it to others who disagree.[66] In the end, the court sidestepped much substantive reasoning by finding that the student lacked standing, as he had shown no demonstrable injury-in-fact or redressability for the chilled speech.[67] One judge dissented, however, in an opinion reminiscent of Judge Posner's decision in *Zamecnik v. Indian Prairie School District No. 204*,[68] asserting that a chill on an individual's ability to exercise free speech is a constitutional injury-in-fact, especially where, as here, there is a rule specifically proscriptive of speech.[69]

School officials, government agencies, parents, and students increasingly expect schools to create completely safe and harassment-free learning environments. Schools are feeling growing demands to police bullying behavior more aggressively. When schools proceed less aggressively, or when parents deem their actions insufficient, particularly where tragic suicides are involved, litigation ensues.[70] Because so many of these cases are brought in federal courts, alleging federal civil rights and constitutional violations, the economic stakes for school districts are high.[71] For example, in 2012, the mother of a student who

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 611.

68. 636 F.3d 874 (7th Cir. 2011). *See* discussion of *Zamecnik*, *infra* notes 79–88 and accompanying text.

69. *Morrison*, 521 F.3d at 617–18 (Moore, J., dissenting).

70. For a survey of fourteen recent lawsuits in federal court alleging school inaction or indifference in bullying or harassment cases see, TRAINOR, *supra* note 2, at 12.

71. *Id.* ("Because there is no established 'bullying' cause of action, plaintiffs tend to plead a variety of claims. As the chart indicates, the most common causes of action are those based on state law, with most complaints alleging some form of negligence or failure to supervise or train staff. Federal

committed suicide after being harassed and bullied by classmates for several years, filed a wrongful death lawsuit in an Indiana district court alleging the student's high school's responses to harassment led to the teen's suicide.[72] The suit claimed the student was "subjected to relentless harassment, ridicule and bullying" over the course of several years because of his ethnicity and sexual orientation.[73] In another instance, a federal district court in Texas granted a school district's motion for reconsideration in a similar suit brought by a parent.[74] The court dismissed the parent's § 1983 due process claim alleging that the school's failure to enforce anti-bullying policies contributed to the student's suicide.[75]

Interestingly, the Indiana suit alleges that the student "'had a right to be free from sexual harassment and discrimination based on sexual orientation while in any educational program or activity that receives federal financial assistance,'" and that the school knew about the harassment, but failed to do anything to stem it.[76] The suit, which seeks compensatory and punitive damages, attorneys' fees, and other associated costs, strongly echoes the Dear Colleague Letter, in which the U. S. Department of Education warned schools about failing to eliminate harassment, or to respond to a bullying situation about which the school knew or should have known.[77]

---

suits nearly always allege a violation of the Fourteenth Amendment's Due Process or Equal Protection Clauses, as these concepts tend to encompass a broader range of conduct than specific civil rights statutes.").

72. *See* Brent Brown, *Lucas suit seeks compensation, damages, Claims GCS and faculty at fault for death*, GREENSBURG DAILY NEWS (Sept. 7, 2012), http://greensburgdailynews.com/local/x1059009573/Lucas-suit-seeks-compensation-damages. *See also* WiG, *Mother of gay suicide victim files wrongful death suit*, WISC. GAZETTE (Sept. 10, 2012), http://www.wisconsingazette.com/breaking-news/mother-of-gay-suicide-victim-files-wrongful-death-suit.html.

73. *See* WiG, *supra* note 72.

74. *See* Estate of Brown v. Cypress Fairbanks Indep. Sch. Dist., 863 F. Supp. 2d 632 (S.D. Tex. 2012).

75. *Id.* at 639.

76. WiG, *supra* note 72.

77. *See* Ali, *supra* note 3, at 2 ("A school is responsible for addressing harassment incidents about which it knows or reasonably should have known.").

B. Protecting Free Speech

Not all courts agree, however, that the school's right to regulate speech is boundless even if it involves harassing or bullying speech that contributes to a "hostile environment." Indeed, courts differ about what constitutes harassing speech.[78] Some speech, offensive though it may be to some, expresses a sincerely held belief. When a sincerely held belief is at play, the First Amendment scales tip against regulation, absent some other indicators that the speech will be disruptive or infringes on the rights of others, á la *Tinker*. Phrases on t-shirts, such as "Homosexuality is a Sin" followed by a Bible verse, or "I Believe in Traditional Marriage," may be just such expressions.

In *Zamecnik v. Indian Prairie School District Number 204*, for instance, the U.S. Court of Appeals for the Seventh Circuit found that students were entitled to a permanent injunction barring a school district from banning "Be Happy, Not Gay" t-shirts.[79] Writing for the three-judge panel, Judge Richard Posner found that absent evidence of a *Tinker*-like *substantial* disruption, the school could not ban the wearing of the t-shirts.[80] In essence, the court found that the doctrine of the "heckler's veto" applied to enjoin the school from enforcing its ban, as the speech could not be construed as fighting words.[81]

---

78. *See* Barr v. Lafon, 538 F.3d 554 (6th Cir. 2008) (upholding ban on clothing depicting Confederate flag, concluding that school reasonably forecast substantial and material disruption of school environment); *see also* Castorina v. Madison Cnty. Sch. Bd., 246 F.3d 536 (6th Cir. 2001) (allowing students to continue to wear t-shirts depicting country music star Hank Williams, Jr. and two images of the Confederate flag with the phrase "Southern Thunder" on the back until court determined: (1) whether the school board had enforced the dress code in an unfair and discriminatory manner, and consequently, if the speech was protected under the rules governing schools' authority to regulate student speech, and (2) if wearing the t-shirt created a likelihood of violence or other disruption).

79. Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 875 (7th Cir. 2011). The district court denied the students' motion for a preliminary injunction, but the Seventh Circuit reversed and remanded to the district court. *Id.*

80. *Id.* at 879–80.

81. *Id.* at 879.

The Seventh Circuit rejected the school's claim that the slogan "Be Happy, Not Gay" was "particularly insidious," and rejected the claim of disruption.[82] Specifically, the court found that "the fact that homosexual students and their sympathizers harassed [one of the plaintiff students] because of their disapproval of her message is not a permissible ground for banning it."[83] Significantly, Judge Posner recognized that while schools have a role in protecting students, they cannot go so far as to ban student speech merely because it hurts some students' feelings. As a rule, he said, there is no "generalized 'hurt feelings' defense to a high school's violation of the First Amendment rights of its students."[84] But, Judge Posner's perspective about where the line is drawn is more than a mere dismissive refusal to inject the federal courts into the midst of adolescent tit-for-tats. Rather, Judge Posner casted the speech at issue here as almost purely political, albeit "tepidly negative,"[85] arguing that "school[s] that permit[] advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality."[86] Judge Posner rejected the school's argument "that banning 'Be Happy, Not Gay' was just a matter of protecting the 'rights' of the students against whom derogatory comments are directed," opting instead for the notion that "people in our society do not have a legal right to prevent criticism of their beliefs or even their way of life."[87] Judge Posner clearly believed the t-shirt was a form of a political speech: "Although tolerance of homosexuality

---

82. *Id.* at 881 ("The second type of evidence was barred by the doctrine, unmentioned by the school, of the "heckler's veto." Statements that while not fighting words are met by violence or threats or other unprivileged retaliatory conduct by persons offended by them cannot lawfully be suppressed because of that conduct.") (internal citations omitted).

83. *Id.* at 879.

84. *Id.* at 877. *See also*, Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 206 (3d Cir. 2001) ("[T]here is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs.").

85. *Zamecnik*, 636 F.3d at 876.

86. *Id.* (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 394 (1992); Boos v. Barry, 485 U.S. 312, 321 (1988)).

87. *Id.*

has grown, gay marriage remains highly controversial. Today's high school students may soon find themselves, as voters, asked to vote on whether to approve gay marriage, or to vote for candidates who approve of it, or ones who disapprove."[88]

Other courts, too, appear to look askance at the notion that offensive speech—even speech that may be harassing—can be banned or regulated. This is particularly so where the speech has political import. In *Dariano v. Morgan Hill Unified School District*,[89] a federal district court allowed students to bring a claim based on alleged violations of the First Amendment, the Due Process Clause, and the Equal Protection Clause, where the students contended their principal forbid them from wearing American flag t-shirts.[90] According to the students, the school banned the shirts because the students wore them on Cinco de Mayo, a day observed by some in the United States as a celebration of Mexican-American heritage.[91] School administrators were apparently relying on a school district policy which provided that "[c]lothing . . . or actions which . . . disrupt school activities will not be tolerated. Such actions or the wearing and/or possession of these items may be cause for suspension."[92] Reportedly, other students at the school were wearing the colors of the Mexican flag to school on the same day as the student plaintiffs, but were not asked to remove their clothing.[93] The court eventually granted the school district's motion for summary judgment, finding that school officials reasonably forecast that the t-shirts could cause a substantial disruption with school activities, as at least two different students reported the students were concerned that the clothing would lead to violence.[94]

88. *Id.*

89. 822 F. Supp. 2d 1037 (N.D. Cal. 2011).

90. *Id.*

91. *Id.*

92. Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 7, Dariano v. Morgan Hill Unified Sch. Dist., 822 F. Supp. 2d 1037 (2011) (No. CV10-02745 JW).

93. *Dariano*, 822 F. Supp. 2d at 1046.

94. *Id.* at 1045.

III. NO POLESTAR FROM THE SUPREME COURT

Despite the mixed messages from federal courts, there has yet to be a definitive, Supreme Court decision to help schools navigate the tension between the student speech issues and the increasing national demands for safe learning environments. The Supreme Court's denial of certiorari in three student internet speech cases, *J.S. v. Blue Mountain School District*, as combined with *Layshock v. Hermitage School District*, and *Kowalksi v. Berkeley County Schools*,[95] disappointed education law watchers, who had hoped the High Court would clarify how schools should balance these competing interests.[96]

For public schools the quandary is difficult: Regulate potentially harassing messages expressing sincerely held religious or political beliefs and risk a private suit and its attendant costs for violating a student's constitutional rights, or risk federal enforcement action that threatens federal funding for contributing to a hostile environment? The answer may lie in which *Tinker* prong the High Court ultimately finds applicable in these cases, *and* what it decides infringement of the rights of others ultimately means. *Morse*'s student welfare standard may have something to offer in this regard.[97] Still, more questions remain. The Court will have to wrestle with whether the infringement standard is applied individually or more expansively, perhaps, in the "hostile environment" scenario.

The matter is further complicated by the ubiquitous electronic forum to which students have broad access. Bullying and harassment can at times take place entirely off-campus, over the

---

95. 652 F.3d 565 (4th Cir. 2011), *cert. denied*, ___ U.S. ___, 132 S. Ct. 1095 (Jan. 17, 2012).

96. Allan G. Osborne, Jr. & Charles J. Russo, *Can Students Be Disciplined for Off-Campus Cyberspeech?: The Reach of the First Amendment in the Age of Technology*, 2012 BYU EDUC. & L.J. 331, 367 ("Unfortunately, since the Supreme Court denied certiorari in *Layshock*, *J.S.*, and *Kowalski*, it appears that the Court will not be providing clarity to this complex issue in the next term.").

97. *See generally* Negrón, *supra* note 54.

Internet, or through other electronic communication.[98] Disciplining students for speech is even more difficult when the speech occurs off campus. Significantly, none of the Supreme Court cases discussing disciplining students for speech contemplate whether school districts can discipline students for off-campus speech. And, in the brave new world of social networking, linking speech that occurs in cyberspace to disruption in school poses factual problems not contemplated by the *Tinker* Court. Unfortunately, to date, the federal courts have provided little consistent guidance to help schools determine the line between harassing speech and student free speech, particularly in cyberspace.[99]

And, the Supreme Court's recent denial of certiorari in some student cyber-speech cases suggests it is not yet ready to resolve existing circuit conflicts.[100] Until then, schools will have little choice but to navigate carefully the path set out by the Cheshire Cat between the Mad Hatter and the March Hare.

---

98. Research by Amanda Lenhart at the Pew Research Center's Internet & American Life Project indicates that most teens think bullying and harassment happens more offline than online. *See* Amanda Lenhart, *Cyberbullying 2010: What the Research Tells Us*, PEW INTERNET (May 6, 2010), http://www.pewinternet.org/Presentations/2010/May/Cyberbullying-2010.aspx. *See also* Francisco Negrón, *For Schools, Bullying Can Raise a Complex Constitutional Problem*, 2 WAKE FOREST L. REV. ONLINE 14, 29 (2012).

99. *See, e.g.*, J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 931 (3d Cir. 2011) (applying *Tinker* to find that the school district failed to demonstrate reasonable forecast of substantial disruption), *cert. denied*, ___ U.S. ___, 132 S. Ct. 1097 (2012); Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 214–15 (3d Cir. 2011) (finding that school had not shown sufficient nexus between online speech and the school), *cert. denied*, ___ U.S. ___, 132 S. Ct. 1097 (2012); Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 573 (4th Cir. 2011) (relying on the "nexus" of the student's speech to the school), *cert. denied*, ___ U.S. ___, 132 S. Ct. 1095 (2012). Wisniewski v. Bd. of Ed. of the Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007) (applying *Tinker*'s substantial disruption test to off-campus speech that was "reasonably foreseeable" to come on-campus).

100. *See* McGlone v. Bell, 681 F.3d 718 (6th Cir. 2012) (holding chilled speech is equal to a constitutional free speech violation); Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874 (7th Cir. 2011); *see also* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200 (3d Cir. 2001).